

No. 46250-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TIMOTHY J. ROHN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 13-1-04802-9  
The Honorable Elizabeth Martin, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its constitutional burden of proving all of the essential elements of fourth degree assault.
2. The State failed to prove that Timothy Rohn intentionally assaulted Eugenia Wilson
3. The State failed to prove that, under the doctrine of transferred intent, an intent to assault a third person transferred to Eugenia Wilson.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where Eugenia Wilson testified that Timothy Rohn struck her by accident as he pulled his arm back towards his body, at the same time as she tried to push him away from Fredrick Brown, did the State fail to prove beyond a reasonable doubt that Rohn acted with intent to assault Wilson? (Assignments of Error 1 & 2)
2. Can the doctrine of transferred intent apply and support a conviction for assault against Eugenia Wilson, when the jury did not find that Timothy Rohn intentionally assaulted the person from whom the intent is supposedly transferred? (Assignments of Error 1 & 3)

### **III. STATEMENT OF THE CASE**

Timothy Rohn was a patient confined at Western State Hospital (WSH) on October 14, 2012. (03/31/14 RP 44, 47-48)<sup>1</sup> Fredrick Brown and Eugenia Wilson work at WSH as psychiatric security attendants. (03/31/14 RP 56, 91) That Sunday morning, Fredrick and Eugenia were escorting a group of patients from church services back to their respective wards. (03/31/14 RP 59, 61, 93) As the group entered a stairwell, Rohn pushed open the stairwell door. (03/31/14 RP 61, 94) In his hand, Rohn held a pillowcase, which had several Duracell batteries tied together in the corner. (03/31/14 RP 50-51, 63)

Rohn rushed towards Brown and began hitting him with the batteries. (03/31/14 RP 62, 66, 94) Brown ducked to avoid being hit, but was struck several times in the back. (03/31/14 RP 64-65, 79, 100) Wilson came to Brown's aid and was accidentally struck in the back by Rohn's arm as she tried to push Rohn away from Brown. (03/31/14 RP 100-02, 106, 118, 119)

Brown ran out of the stairwell and Rohn followed after him. (03/31/14 RP 66-67, 77-78) But WSH staff were quickly able to

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<sup>1</sup> The transcripts will be referred to by the date of the proceeding contained therein.

tackle and restrain Rohn. (03/31/14 RP 47-48, 66-67, 77-78, 102) A few days later Rohn apologized to Wilson, saying he was sorry that she had been involved in the incident. (03/31/14 RP 110)

The State charged Rohn with one count of second degree assault against Brown (RCW 9A.36.021(1)(a)), and one count of fourth degree assault against Wilson (RCW 9A.36.041(1)(2)). (CP 16-17) The jury found Rohn guilty of third degree assault against Brown and fourth degree assault against Wilson. (04/02/14 RP 230; CP 22, 23, 50) The trial court sentenced Rohn within his standard range to 29 months of confinement. (05/09/14 RP 255; CP 88) This appeal timely follows. (CP 99)

#### **IV. ARGUMENT & AUTHORITIES**

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State charged Rohn with fourth degree assault against Wilson. (CP 16-17) "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041. "Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury." State v. Tyler, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007); WPIC 35.50.

Intent is an element of fourth degree assault. See State v. Jones, 34 Wn. App. 848, 850, 664 P.2d 12 (1983); State v. Robinson, 58 Wn. App. 599, 606, 794 P.2d 1293 (1990). "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

In this case, the State failed to prove that Rohn intentionally assaulted Wilson. According to Wilson's testimony, Rohn struck her accidentally when she tried to push him away from Brown. (03/31/14 RP 118, 119) His actions were focused on Brown, and she was only struck by Rohn's arm on the "backswing," as he pulled his arm back

after trying to strike Brown. (03/31/14 RP 100-01, 102, 118, 119)  
Rohn was not trying to strike Wilson, or even trying to strike Brown,  
at the time that his arm made contact with Wilson.

The blow to Wilson was incidental and accidental. The State presented no evidence that Rohn intended to make contact with Wilson. Accordingly, there was no evidence that Rohn acted with an objective or purpose to accomplish an offensive touching of Wilson.

The State argued at trial that Rohn is guilty of assaulting Wilson under the doctrine of transferred intent. (04/01/14 RP 208-09) Under that doctrine, once the intent to inflict harm on one victim is established, the mens rea transfers to any other victim who is actually assaulted. State v. Aguilar, 176 Wn. App. 264, 275, 308 P.3d 778 (2013); State v. Clinton, 25 Wn. App. 400, 403, 606 P.2d 1240 (1980). Accordingly, if the State proved that Rohn acted with intent to assault Brown, but harmed Wilson, then Rohn is deemed to have acted with intent to assault Wilson.<sup>2</sup>

However, the jury did not find that Rohn acted with intent to assault Brown. Second degree assault, as charged and instructed in this case, required the jury to find that Rohn intentionally assaulted

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<sup>2</sup> As instructed in this case, “[i]f a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.” (CP 41)



Brown.<sup>3</sup> (CP 16, 34) But the jury rejected this charge, and instead found Rohn guilty of third degree assault against Brown, which required the jury to find that Rohn acted with negligence only.<sup>4</sup> (35, 36) Accordingly, there was no intent to assault that could transfer Wilson.<sup>5</sup>

Because the State failed to prove that Rohn intentionally assaulted Wilson or that an intent to assault Brown transferred to Wilson, the fourth degree assault conviction must be reversed.<sup>6</sup>

## **V. CONCLUSION**

Wilson was struck accidentally by Rohn as he pulled his arm back at the same time as she pushed him away from Brown. The State's evidence therefore did not establish that Rohn acted with the intent to assault Wilson. In addition, the jury found no intent to

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<sup>3</sup> See RCW 9A.36.021(1)(a), which provides: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . Intentionally assaults another and thereby recklessly inflicts substantial bodily harm[.]"

<sup>4</sup> See RCW 9A.36.031(1)(d) which provides: "A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree . . . With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm[.]"

<sup>5</sup> Conviction of a lesser-included offense acts as an implied acquittal of the greater offense. See Green v. United States, 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); Brazzel v. Washington, 491 F.3d 976, 985 (9th Cir. 2007).

<sup>6</sup> The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

assault Brown, therefore, there was no intent that could transfer to Wilson. Accordingly, the State failed to meet its burden of proving beyond a reasonable doubt that Rohn assaulted Wilson, and this conviction must be reversed and dismissed.

DATED: December 12, 2014



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Attorney for Timothy J. Rohn

**CERTIFICATE OF MAILING**

I certify that on 12/12/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Timothy J. Rohn, DOC# 884653, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**December 12, 2014 - 2:58 PM**

## Transmittal Letter

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